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NEGOTIATION ETHICS: HOW TO BE DECEPTIVE WITHOUT BEING DISHONEST/ HOW TO BE ASSERTIVE WITHOUT BEING OFFENSIVE

By Charles B. Craver¹

I. INTRODUCTION

When experts discuss alternative dispute resolution procedures, they generally focus on mediation, neutral case evaluation, mini-trials, arbitration, and other forms of third-party intervention. They ignore the most basic form of dispute resolution -- negotiation. Most practicing lawyers are not litigators. They handle family and property matters, trusts and estates, business transactions, tax controversies, and similar situations. They almost never participate in judicial or arbitral adjudications. Most of their interactions with other lawyers involve negotiations. When direct negotiations do not generate mutual accords, they may request mediation assistance. Even litigators rarely participate in formal adjudications, due to the high financial and emotional costs and the unpredictable nature of those proceedings. They thus resolve 90 to 95 percent

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of their cases through direct inter-party discussions or mediator-assisted settlement talks.

Mediation is not a distinct form of dispute resolution. It is *assisted negotiation*. Mediators lack the authority to impose terms on disputants. They only possess the power of personal persuasion. They employ negotiation skills to reopen blocked communication channels and to encourage further inter-party discussions. Each mediator negotiates with the parties -- jointly and separately -- while the parties negotiate with each other through the mediator and directly with mediator assistance.

Most attorneys feel some degree of professional discomfort when they negotiate with other lawyers. If they hope to achieve beneficial results for their clients, they must convince their opponents that those parties must offer more generous terms than they must actually offer if agreements are to be generated. To accomplish this objective, lawyers usually employ some deceptive tactics. Take for example two parties bargaining over the purchase/sale of a small business. The Seller is willing to accept \$500,000, while the Buyer is willing to pay \$575,000. The Seller's attorney initially indicates that the Seller must obtain \$600,000, with the Buyer's lawyer suggesting that the Buyer cannot go above

\$450,000. Once these preliminary offers have been exchanged, the parties are pleased with the successful way in which they have begun their discussions. Yet both have begun with position statements designed to mislead the other side. Have they behaved unethically? Are they obliged to disclose their true bargaining needs and intentions to preserve their professional reputations? May they never reject offers they know their clients will accept?

During their subsequent discussions, the Seller's representative is likely to embellish the value of the business being sold, while the Buyer's advocate undervalues that firm. Must the Seller's attorney admit that the Seller believes that future competition from foreign firms is likely to diminish the economic value of his/her company? Must the Buyer's lawyer disclose the Buyer's innovative plan to enhance the competitive position and future value of this particular firm? When does the Seller-advocate's embellishment exceed the bounds of bargaining propriety? To what extent may the Buyer-representative disingenuously undervalue the company being discussed? Are the Buyer and Seller representatives ethically obliged to ensure a "fair" price for the business? If the Seller is willing to accept less than the Buyer anticipated or the Buyer is willing to pay more than the Seller imagined, would the lawyer representing the

other side be duty bound to disclose this fact and attempt to moderate the other side's "unrealistic" beliefs?

Some advocates may try to advance client interests through tactics that are designed to make their opponents feel uncomfortable. They may be rude or inconsiderate, or may employ overly aggressive bargaining tactics. A few may resort to abrasive or even hostile behavior they hope will disconcert unsuspecting adversaries. To what extent may Buyer or Seller representatives employ highly competitive or adversarial negotiating techniques in an effort to obtain beneficial client results? At what point would such conduct transcend the bounds of appropriate behavior?

II. APPROPRIATE AND INAPPROPRIATE MISREPRESENTATIONS

I frequently surprise law students and practitioners by telling them that while I have rarely participated in legal negotiations in which both participants did not use some misstatements to further client interests, I have encountered few dishonest lawyers. I suggest that the fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble. Many negotiators initially find it

difficult to accept the notion that disingenuous “puffing” and deliberate mendacity do not always constitute reprehensible conduct.

It is easy to exhort legal practitioners to behave in an exemplary manner when they participate in the negotiation process:

[T]he lawyer is not free to do anything his client might do in the same circumstances [T]he lawyer must be at least as candid and honest as his client would be required to be Beyond that, the profession should embrace an affirmative ethical standard for attorneys’ professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith*. Another lawyer ... should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar [S]urely the professional standards must ultimately impose upon him a duty not to accept an unconscionable deal. While some difficulty in line-drawing is inevitable when such a distinction is sought to be made, there must be a point at which the lawyer cannot ethically accept an arrangement that is completely unfair to the other side²

Despite the nobility of such pronouncements, others maintain that “[p]ious and generalized assertions that the negotiator must be ‘honest’ or that the lawyer must

² Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 589, 591 (1975) (emphasis in original). Compare Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951): “[O]ne of the functions of a lawyer is to lie for his client. . . A lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in.”

use ‘candor’ are not helpful.”³ They recognize that negotiation interactions involve a deceptive process in which a certain amount of “puffing” and “embellishment” is expected, as the participants attempt to convince their opponents that they must obtain better terms than they must actually achieve.⁴

Observers also note that trustworthiness is a relative concept that is rarely defined in absolute terms, based on different expectations in diverse situations.

[T]rustworthiness and its outward manifestation -- truth telling -- are not absolute values. For example, no one tells the truth all of the time, nor is perpetual truth telling expected in most circumstances. To tell the truth in some social situations would be a rude convention. Consequently, when one speaks of the essential nature of trustworthiness and truth telling, one actually is talking about a certain circumstance or situation in which convention calls for trustworthiness or truth telling. Thus, a person considered trustworthy and a truth teller actually is a person who tells the truth at the right or necessary time.⁵

Did the Buyer and Seller representatives mentioned above commit ethical violations when they disingenuously said that the Seller had to obtain \$600,000 -- while willing to accept \$500,000 -- and that the Buyer could not go above

³ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 929 (1980).

⁴ See Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1391-95 (1986).

⁵ *Id.* at 1388.

\$450,000 -- while willing to pay \$575,000? Some lawyers attempt to circumvent this moral dilemma by formulating opening positions that do not directly misstate their actual intentions. For example, the Buyer may indicate that he/she “doesn’t *wish to* pay more than \$450,000” or the Seller may say that he/she “would not be *inclined to* accept less than \$600,000” While these preliminary statements may be technically true, the italicized verbal leaks (“*wish to*”/“*inclined to*”) would inform attentive opponents that these speakers do not really mean what they appear to be communicating. The Seller does not care whether the Buyer *wishes to* pay more than \$450,000, but only whether he/she will do so, just as the Buyer does not care whether the Seller is *inclined to* accept less than \$600,000. If these were true limitations, the speakers would be likely to use more definitive language containing no undermining modifiers, such as “I cannot go above or below X.” As a result of these speaker efforts to maintain their personal integrity, careful listeners should easily discern the disingenuous nature of the statements being made by them. The use of these devices to “truthfully” deceive opponents would thus be unavailing.

When students or practicing attorneys are asked whether they expect opposing counsel to candidly disclose their true authorized limits or their actual bottom lines

at the beginning of bargaining interactions, most exhibit discernible discomfort. They recall the numerous times they have commenced negotiations with exaggerated or distorted position statements they did not expect their adversaries to take literally, and they begin to understand the dilemma confronted regularly by all legal negotiators.

On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled. ... [A] careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position.... To conceal one's true position, to mislead an opponent about one's true settling point is the essence of negotiation.⁶

Some writers criticize the use of deceptive negotiating tactics to further client interests. They maintain that these devices diminish the likelihood of Pareto optimal results, because "deception tends to shift wealth from the risk-averse to the risk-tolerant." While this observation is undoubtedly true, it is unlikely to discourage the pervasive use of ethically permissible tactics that are designed to

⁶ White, *supra* note 3, at 927-28.

deceive risk-averse opponents into believing they must accept less beneficial terms than they need actually accept. It is thus unproductive to discuss a utopian negotiation world in which complete disclosure is the norm. The real question concerns the types of deceptive tactics that may ethically be employed to enhance bargaining interests.⁷ Attorneys who believe that no prevarication is ever proper during bargaining encounters place themselves and their clients at a distinct disadvantage, since they permit their less candid opponents to obtain settlements that transcend the terms to which they are objectively entitled.⁸

The schizophrenic character of the ethical conundrum encountered by legal negotiators is apparent in the ABA Model Rules of Professional Conduct, which were adopted by the House of Delegates in August of 1983. Rule 4.1(a), which corresponds to EC 7-102(A)(5) under the ABA Code of Professional Responsibility, states that “a lawyer shall not knowingly make a false statement of material fact or law to a third person.”⁹ This seemingly unequivocal principle

⁷ See generally Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989).

⁸ See Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1230 (1990).

⁹ THOMAS D. MORGAN & RONALD D. ROTUNDA, 1995 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 76-77 (1995).

is intended to apply to both litigation and negotiation settings.¹⁰ An explanatory Comment under this Rule reiterates the fact that “[a] lawyer is required to be truthful when dealing with others on a client’s behalf....” Nonetheless, Comment Two acknowledges the difficulty of defining “truthfulness” in the unique context of the negotiation process:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category¹¹

Even state bars that have not appended this Comment to their version of Rule 4.1 have appropriately recognized the ethical distinctions drawn in that Comment.

Although the ABA Model Rules unambiguously proscribe all lawyer prevarication, they reasonably, but confusingly, exclude mere “puffing” and dissembling regarding one’s true minimum objectives.¹² These important exceptions appropriately recognize that disingenuous behavior is indigenous to

¹⁰ See RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 167 (4th ed. 1995).

¹¹ MORGAN & ROTUNDA, *supra* note 9, at 76-77.

¹² See ROTUNDA, *supra* note 10, at 167-68; Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KAN. L. REV. 69, 101 (1982).

most legal negotiations and could not realistically be prevented due to the nonpublic nature of bargaining interactions.

If one negotiator lies to another, only by happenstance will the other discover the lie. If the settlement is concluded by negotiation, there will be no trial, no public testimony by conflicting witnesses, and thus no opportunity to examine the truthfulness of assertions made during the negotiation. Consequently, in negotiation, more than in other contexts, ethical norms can probably be violated with greater confidence that there will be no discovery and punishment.¹³

One of the inherent conflicts with regard to this area concerns the fact that what people label acceptable “puffing” when they make value-based representations during legal negotiations may be considered improper mendacity when uttered by opposing counsel.

Even though advocate prevarication during legal negotiations rarely results in bar disciplinary action, practitioners must recognize that other risks are created by truly dishonest bargaining behavior. Attorneys who deliberately deceive opponents regarding material matters or who withhold information they are legally obliged to disclose may be guilty of fraud. Contracts procured through fraudulent acts of commission or omission are voidable, and the responsible advocates and

¹³ White, *supra* note 3, at 926. *But cf.* Monroe v. State Bar, 10 Cal. Rptr. 257, 261, 358 P.2d 529, 533 (1961) (sustaining nine-month suspension of practitioner, since “[i]ntentionally deceiving opposing counsel is ground for disciplinary action”).

their clients may be held liable for monetary damages.¹⁴ It would be particularly embarrassing for lawyers to make misrepresentations that could cause their clients additional legal problems transcending those the attorneys were endeavoring to resolve. Since the adversely affected clients might thereafter sue their culpable former counsel for legal malpractice, the ultimate injury to the reputations and practices of the deceptive attorneys could be momentous.¹⁵ Legal representatives who employ clearly improper bargaining tactics may even subject themselves to judicial sanctions.¹⁶

Most legal representatives always conduct their negotiations with appropriate candor, because they are moral individuals and/or believe that such professional behavior is mandated by the applicable ethical standards. A few others, however, do not feel so constrained. These persons should consider the practical risks associated with disreputable bargaining conduct. Even if their deceitful action is not reported to the state bar and never results in personal liability for fraud or legal malpractice, their aberrational behavior is likely to be eventually discovered by

¹⁴ See Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 86-94 (1985). See also Steele, *supra* note 4, at 1395-96; Rubin, *supra* note 2, at 587.

¹⁵ See Perschbacher, *supra* note 14, at 81-86, 107-112.

¹⁶ See, e.g., *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985).

their fellow practitioners. As other attorneys learn that particular lawyers are not minimally trustworthy, future interactions become more difficult for those persons.¹⁷ Factual and legal representations are no longer accepted without time-consuming and expensive verification. Oral agreements on the telephone and handshake arrangements are no longer acceptable. Executed written documents are required for even rudimentary transactions. Attorneys who contemplate the employment of unacceptable deception to further present client interests should always be cognizant of the fact that their myopic conduct may seriously jeopardize their future effectiveness. No short-term gain achieved through deviant behavior should ever be permitted to outweigh the likely long-term consequences of those improper actions.

When lawyers negotiate, they must constantly decide whether they are going to divulge relevant legal and/or factual information to opposing counsel. If they decide to disclose some pertinent information, may they do so partially or is complete disclosure required? They must also determine the areas they may permissibly misrepresent and the areas they may not distort.

¹⁷ J.K. MURNIGHAN, BARGAINING GAMES 230-31 (1992).

A. Nondisclosure of Information.

Even though Model Rule 4.1(a) states that attorneys must be truthful when they make statements concerning material law or fact, Comment One expressly indicates that lawyers have "no affirmative duty to inform an opposing party of relevant facts."¹⁸ In the absence of special relationships or express contractual or statutory duties, practitioners are normally not obliged to divulge relevant legal or factual information to their adversaries.¹⁹ This doctrine is premised upon the duty of representatives to conduct their own legal research and factual investigations. Under our adversary system, attorneys do not have the right to expect their opponents to assist them in this regard. It is only when cases reach tribunals that Model Rule 3.3(a)(3) imposes an affirmative obligation on advocates "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."²⁰ No such duty is imposed, however, with respect to pertinent factual circumstances that are not discovered by opposing counsel.

¹⁸ MORGAN & ROTUNDA, *supra* note 9, at 76.

¹⁹ See Robert B. McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 ARB. J. 15, 19 (Mar. 1990).

²⁰ MORGAN & ROTUNDA, *supra* note 9, at 62.

Suppose attorneys representing a severely injured plaintiff learn, during the critical stages of settlement talks, that their client has died due to unrelated factors. Would they be under an ethical duty to disclose this fact to defense counsel who are clearly assuming continuing pain and suffering and future medical care for the plaintiff? Although one court held that "plaintiff's attorney clearly had a duty to disclose the death of his client both to the Court and to opposing counsel prior to negotiating the [settlement] agreement,"²¹ this conclusion is not supported by the Comment to Rule 4.1 pertaining to negotiation discussions. Nonetheless, since the death of the plaintiff would presumably have necessitated the substitution of plaintiff's estate executor, plaintiff counsel may have been under a duty to notify defense attorneys of this development before concluding any agreement that would have affected the estate. A similar issue would arise if plaintiff lawyers learned that their client had miraculously recovered from the serious condition that provides the basis of the current law suit. If plaintiff attorneys in either of these situations had previously answered interrogatories concerning the health of the plaintiff, they would probably be obliged under *Fed. Rule of Civ. Pro.* 26(e)(2) to supplement their previous responses.

²¹ See *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983).

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Suppose the party possessing the relevant information regarding the plaintiff is not the plaintiff's attorney, but rather defense counsel? This issue was confronted by the Minnesota Supreme Court in *Spaulding v. Zimmerman*.²² Plaintiff Spaulding was injured in an automobile accident when Defendant Ledermann's car, in which the Plaintiff was riding, collided with Defendant Zimmerman's vehicle. He suffered multiple rib fractures, bilateral fractures of the clavicles, and a severe cerebral concussion. Several doctors who treated the Plaintiff concluded that his injuries had completely healed. As the trial date approached, the defense attorneys had Spaulding examined by a neurologist who was expected to provide expert testimony for the defense. That physician agreed that the ribs and clavicles had healed, but discovered a life-threatening aneurysm on Spaulding's aorta. Defense counsel were never asked by Plaintiff counsel about the results of this examination, and the defense lawyers did not volunteer any

²² 116 N.W.2d 704 (Minn. Sup. Ct. 1962).

information about it.

A settlement agreement was achieved, which had to be approved by the trial court since Spaulding was a minor. After the case was settled, Spaulding discovered the aneurysm, which was surgically repaired, and he sued to set aside the prior settlement. The trial court vacated the settlement, and this decision was sustained by the Minnesota Supreme Court. Despite the fact that most people would undoubtedly regard an affirmative duty to disclose the crucial information as the morally appropriate approach, the Minnesota Supreme Court correctly determined that the defense attorneys were under no ethical duty to volunteer the new medical information to Plaintiff counsel. In fact, without client consent, the confidentiality preservation obligation imposed by Model Rule 1.6 would preclude volitional disclosure by defense counsel under these circumstances.²³ Comment 5 explicitly states that “[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”²⁴

The *Spaulding* Court circumvented the Rule 1.6 prohibition by holding that

²³ See MORGAN & ROTUNDA, *supra* note 9, at 18-19.

²⁴ *Id.* at 19.

as officers of the court, defense counsel had an affirmative duty to disclose the newly discovered medical information to the trial court prior to its approval of the settlement agreement. Had Spaulding not been a minor, the Court may have had to enforce the original accord, because of the absence of any trial court involvement in the settlement process. If courts are unwilling to impose affirmative disclosure obligations on advocates who possess such critical information pertaining to opposing clients, they should sustain the resulting settlement agreements despite the lack of disclosure. This would at least permit defense lawyers to divulge the negative information as soon as the settlement terms have been satisfied. By voiding such agreements after plaintiffs learn of the withheld information, courts effectively require defense attorneys to remain silent even after the law suits have been finally resolved.

Attorneys can easily avoid these disclosure problems by remembering to ask the appropriate questions concerning uncertain areas before they enter into settlement agreements. Defense lawyers can directly ask if the plaintiff's condition has changed in any way. Plaintiff representatives could not ethically misrepresent the material condition of their client. If they were to use evasive techniques to avoid direct responses, plaintiff lawyers should restate their inquiries and demand

specific answers. If plaintiff attorneys know that defense counsel have had the plaintiff examined by a medical expert, they should always ask about the results of that examination. They should also request a copy of the resulting medical report, since they are entitled to that information in exchange for the right of defense counsel to have the plaintiff examined. While defense counsel may merely confirm what plaintiff lawyers already know, it is possible that plaintiff attorneys will obtain new information that will affect settlement discussions.

Suppose plaintiff or defense lawyers are on the verge of a law suit settlement based upon a line of State Supreme Court cases favoring their client. The morning of the day they are going to conclude their transaction, the State Supreme Court issues an opinion overturning those beneficial decisions and indicating that the new rule applies to all pending cases. Would knowledgeable attorneys whose position has been undermined by these legal changes be obligated to inform their unsuspecting opponents about these critical judicial developments? Almost all practitioners asked this question respond in the negative, based on their belief that opposing counsel are obliged to conduct their own legal research. Sagacious lawyers would recognize, however, that they could no longer rely upon the overturned decisions to support their afternoon discussions, because these legal

misstatements would contravene Rule 4.1. On the other hand, they could probably ask their unsuspecting adversaries if they could cite a single case supporting their position!

B. Partial Disclosure of Information.

Negotiators regularly use selective disclosures to enhance their positions. They divulge the legal doctrines and factual information beneficial to their claims, while withholding circumstances that are not helpful. In most instances, these selective disclosures are expected by opponents and are considered an inherent aspect of bargaining interactions. When attorneys emphasize their strengths, opposing counsel must attempt to ascertain their undisclosed weaknesses. They should carefully listen for verbal leaks and look for nonverbal signals that may indicate the existence of possible opponent problems. Probing questions may be used to elicit some negative information, and external research may be employed to gather other relevant data. These efforts are particularly important when opponents carefully limit their disclosures to favorable circumstances, since their partial disclosures may cause listeners to make erroneous assumptions.

When I discuss negotiating ethics with legal practitioners, I often ask if

lawyers are obliged to disclose information to correct erroneous factual or legal assumptions made by opposing counsel. Most respondents perceive no duty to correct legal or factual misunderstandings generated solely by the carelessness of opposing attorneys. Respondents only hesitate when opponent misperceptions may have resulted from misinterpretations of seemingly honest statements made by them. For example, when a plaintiff attorney embellishes the pain being experienced by a client with a severely sprained ankle, the defense lawyer may indicate how painful *broken* ankles can be. If the plaintiff representative has said nothing to create this false impression, should he or she be obliged to correct the obvious defense counsel error? Although a respectable minority of respondents believe that an affirmative duty to correct the misperception may exist here -- due to the fact plaintiff embellishments may have inadvertently contributed to the misunderstanding -- most respondents feel no such obligation. So long as they have not directly generated the erroneous belief, it is not their duty to correct it. They could not, however, include their opponent's misunderstanding in their own statements, since this would cause them to improperly articulate knowing misrepresentations of material fact.

When opponent misperceptions concern legal doctrines, almost no

respondents perceive a duty to correct those misconceptions. They indicate that each side is obliged to conduct its own legal research. If opposing counsel make incorrect assumptions or carelessly fail to locate applicable statutes or cases, those advocates do not have the right to expect their adversaries to provide them with legal assistance. The more knowledgeable advocates may even continue to rely on precedents supporting their own claims, so long as they do not distort those decisions or the opinions supporting the other side's positions.

Under some circumstances, partial answers may mislead opposing counsel as effectively as direct misrepresentations. For example, the Plaintiff in *Spaulding v. Zimmerman*,²⁵ discussed in Section A, sustained cracked ribs and fractured clavicles in an automobile accident. After the ribs and clavicles had healed, the defense lawyers had the Plaintiff examined by their own medical expert who detected an aorta aneurysm that Plaintiff attorneys did not know about. While defense counsel were probably under no ethical obligation to voluntarily disclose existence of the aneurysm and they could use evasive responses to avoid answering opponent inquiries regarding the Plaintiff's condition, they could not overtly misrepresent their physician's findings by stating that the Plaintiff was in

²⁵ 116 N.W.2d 704 (Minn. Sup. Ct. 1962).

perfect health. Could Defendant attorneys respond to Plaintiff counsel questions by indicating that “the ribs and the clavicles have healed nicely?” Would this *partial disclosure* constitute a deliberate misrepresentation of material fact, because the Defendant lawyers realize that Plaintiff counsel are interpreting this statement in a more expansive manner? Most practitioners have indicated that they would refuse to provide partial responses that would mislead Plaintiff counsel into believing the Plaintiff had completely recovered. While they could decline to answer questions regarding the Plaintiff’s health, they should not be permitted to provide partial responses they know will deceive Plaintiff counsel. Nonetheless, recipients of answers limited to such specific conditions should become suspicious and ask follow-up inquiries about other problems that may have been discovered.

C. Overt Misrepresentation of Information.

When lawyers are asked if negotiators may overtly misrepresent legal or factual matters, most immediately reply in the negative. Many cite Model Rule 4.1 and suggest that this prohibition covers all intentional misrepresentations. While they are correct with respect to deliberate misstatements concerning material legal

doctrines, they are not entirely correct with respect to factual issues. Almost all negotiators expect opponents to engage in "puffing" and "embellishment." Advocates who hope to obtain \$50,000 settlements may initially insist upon \$150,000 or even \$200,000. They may also embellish the pain experienced by their client, so long as their exaggerations do not transcend the bounds of expected propriety. Individuals involved in a corporate buy out may initially over or under value the real property, the building and equipment, the inventory, the accounts receivable, the patent rights and trademarks, and the good will of the pertinent firm.

It is clear that lawyers may not intentionally misrepresent *material* facts, but it is not always apparent what facts are "*material*." The previously noted Comment to Rule 4.1 explicitly acknowledges that "estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim" do not constitute "*material*" facts under that provision. It is thus ethical for legal negotiators to misrepresent the value their client places on particular items. For example, attorneys representing one spouse involved in a marital dissolution may indicate that their client wants joint custody of the children, when he or she does not. Lawyers representing a party attempting to purchase a

particular company may understate their client's belief regarding the value of the good will associated with the target firm. So long as the statement conveys their side's belief -- and does not falsely indicate the view of an outside expert, such as an accountant -- no Rule 4.1 violation would occur.

Legal negotiators may also misrepresent client settlement intentions. They may ethically suggest to opposing counsel that an outstanding offer is unacceptable, even though they know the proposed terms would be accepted if no additional concessions could be generated. Nonetheless, it is important to emphasize that this Rule 4.1 exception does not wholly excuse all misstatements regarding client settlement intentions. During the early stages of bargaining interactions, most practitioners do not expect opponents to disclose exact client desires. As negotiators approach final agreements, however, they anticipate a greater degree of candor. If negotiators were to deliberately deceive adversaries about this issue during the closing stage of their interaction, most attorneys would consider them dishonest, even though the Rule 4.1 proscription would remain inapplicable.

The relevant Comment to Rule 4.1 is explicitly restricted to *negotiations* with *opposing counsel*. Outside that narrow setting, statements pertaining to client

settlement objectives may constitute “material” fact. *ABA Formal Opin. 93-370* (1993) indicated that knowing misrepresentations regarding client settlement intentions to judges during pretrial settlement discussions would be impermissible, because the misstatements would not be confined to adversarial bargaining interactions.²⁶

When material facts are involved, attorneys may not deliberately misrepresent the actual circumstances. They may employ evasive techniques to avoid answering opponent questions, but they may not provide false or misleading answers. If they decide to respond to inquiries pertaining to material facts, they must do so honestly. They must also be careful not to issue partially correct statements they know will be misinterpreted by their opponents, since such deliberate deception would be likely to contravene Rule 4.1

A crucial distinction is drawn between statements of lawyer opinion and statements of material fact. When attorneys merely express their opinions -- *e.g.*, “I think the defendant had consumed too much alcohol”; “I believe the plaintiff will encounter future medical difficulties” -- they are not constrained by Rule 4.1. Opposing counsel know that these recitations only concern the personal views of

²⁶ See ROTUNDA, *supra* note 10, at 168.

the speakers. These statements are critically different from lawyer statements indicating that they have witnesses who can testify to these matters. If representations regarding witness information is knowingly false, the misstatements would clearly violate Rule 4.1.

A frequently debated area concerns representations about one's authorized limits. Many attorneys refuse to answer "unfair" questions concerning their authorized limits, because these inquiries pertain to confidential attorney-client communications. If negotiators decide to respond to these queries, must they do so honestly? Some lawyers believe that truthful responses are required, since they concern material facts. Other practitioners assert that responses about client authorizations merely reflect client valuations and settlement intentions and are thus excluded from the scope of Rule 4.1 by the drafter's Comment. As a result, they think that attorneys may distort these matters.²⁷

Negotiators who know they cannot avoid the impact of questions concerning their authorized limits by labeling them "unfair" and who find it difficult to provide knowingly false responses can employ an alternative approach. If the plaintiff lawyer who is demanding \$120,000 asks the defendant attorney who is

²⁷ See Michael H. Rubin, *The Ethics of Negotiations: Are There Any?* 56 LA. L. REV. 447, 454-54 (1995).

presently offering \$85,000 whether he or she is authorized to provide \$100,000, the recipient may treat the \$100,000 figure as a new plaintiff proposal. That individual can reply that the \$100,000 sum suggested by plaintiff counsel is more realistic but still exorbitant. The plaintiff attorney may become preoccupied with the need to clarify the fact that he or she did not intend to suggest any reduction in his or her outstanding \$120,000 demand. That person would probably forego further attempts to ascertain the authorized limits possessed by the defendant attorney!

III. UNCONSCIONABLE TACTICS AND AGREEMENTS

In recent years, a number of legal representatives -- especially in large urban areas -- have decided to employ highly offensive tactics to advance client interests. They may be rude, sarcastic, or nasty. These individuals erroneously equate discourteous actions with effective advocacy. They use these techniques as a substitute for lawyering skill. Proficient practitioners recognize that impolite behavior is the antithesis of competent representation.

Legal representatives should eschew tactics that are merely designed to humiliate or harass opponents. ABA Model Rule 4.4 expressly states that “a

lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”²⁸ Demented win-lose negotiators occasionally endeavor to achieve total annihilation of adversaries through the cruel and unnecessary degradation of opposing counsel. When advocates obtain munificent settlement terms for their client, there is no reason for them to employ tactics intended to discomfort their adversaries. Not only is such behavior morally reprehensible, but it needlessly exposes the offensive perpetrators to future recriminations that could easily be avoided through common courtesy. This approach also guarantees the offensive actors far more nonsettlements than are experienced by their more cooperative cohorts, and it tends to generate less efficient bargaining distributions.

Many practicing attorneys seem to think that competitive/adversarial negotiators -- who use highly competitive tactics to maximize their own client returns -- achieve more beneficial results for their clients than their cooperative/problem-solving colleagues -- who employ more cooperative techniques designed to maximize the joint return to the parties involved. This notion was contradicted by an empirical study conducted by Professor Gerald

²⁸ MORGAN & ROTUNDA, *supra* note 9, at 78. See Lowenthal, *supra* note 12, at 102.

Williams of legal practitioners in Denver and Phoenix. He found that 65 percent of negotiators were considered cooperative/problem-solvers by their peers, 24 percent were viewed as competitive/adversarial, and 11 percent did not fit in either category.²⁹ When the respondents were asked to indicate which attorneys were “effective,” “average,” and “ineffective” negotiators, the results were striking. While 59 percent of the cooperative/problem-solving lawyers were rated “effective,” only 25 percent of competitive/adversarial attorneys were.³⁰ On the other hand, while a mere 3 percent of cooperative/problem-solvers were considered “ineffective,” 33 percent of competitive/adversarial bargainers were.

In his study, Professor Williams found that certain traits were shared by both effective cooperative/problem-solving negotiators and effective competitive/adversarial bargainers.³¹ Successful negotiators from both groups are thoroughly prepared, behave in an honest and ethical manner, are perceptive readers of opponent cues, are analytical, realistic, and convincing, and observe the courtesies of the bar. The proficient negotiators from both groups also sought to

²⁹ See GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 19 (1983).

³⁰ *Id.*

³¹ *Id.*, at 20-30.

maximize their *own client's* return. Since this is the quintessential characteristic of competitive/adversarial bargainers, it would suggest that a number of successful negotiators may be adroitly masquerading as sheep in wolves' clothing. They exude a cooperative style, but seek competitive objectives.

Most successful negotiators are able to combine the most salient traits associated with the cooperative/problem-solving and the competitive/adversarial styles.³² They endeavor to maximize client returns, but attempt to accomplish this objective in a congenial and seemingly ingenuous manner.³³ They look for shared values in recognition of the fact that by maximizing joint returns, they are more likely to obtain the best settlements for their own clients. Although they try to manipulate opponent perceptions, they rarely resort to truly deceitful tactics. They know that a loss of credibility will undermine their ability to achieve beneficial results. Despite the fact they want as much as possible for their own clients, they are not “win-lose” negotiators who judge their results, not by how well they have done, but by how poorly they think their opponents have done.. They realize that the imposition of poor terms on opponents does not necessarily benefit their own

³² See JAMES C. FREUND, SMART NEGOTIATING 24-27 (1992); HERBERT M. KRITZER, LET'S MAKE A DEAL 78-79 (1991); BOB WOOLF, FRIENDLY PERSUASION 34-35 (1990).

³³ See ROBERT MAYER, POWER PLAYS 7-8, 92 (1996).

clients. All factors being equal, they want to maximize opponent satisfaction. So long as it does not require significant concessions on their part, they acknowledge the benefits to be derived from this approach. The more satisfied opponents are, the more likely those parties are to accept proposed terms and to honor the resulting agreements.

These eclectic negotiators employ a composite style. They may be characterized as competitive/problem-solvers. They seek competitive goals (maximum client returns), but endeavor to accomplish those objectives through problem-solving strategies.³⁴ They exude a cooperative approach and follow the courtesies of the legal profession. They avoid rude or inconsiderate behavior, recognizing that such openly adversarial conduct is likely to generate competitive/adversarial responses from their opponents. They appreciate the fact that individuals who employ wholly inappropriate tactics almost always induce opposing counsel to work harder to avoid exploitation by these openly opportunistic bargainers. Legal negotiators who are contemplating the use of offensive techniques should simply ask themselves how they would react if similar tactics were employed against them.

³⁴ See ROGER DAWSON, ROGER DAWSON'S SECRETS OF POWER NEGOTIATING 115 (1995); KRITZER, *supra* note 32, at 78-79.

Rule 4.3 of the 1980 Discussion Draft of the ABA Model Rules would have instructed attorneys not to conclude any agreement “the lawyer knows or reasonably should know ... would be held to be unconscionable as a matter of law.”³⁵ This provision would have substantially satisfied the admonition of Judge Rubin against the negotiation of “unconscionable deals.”³⁶ Nonetheless, this proposal was omitted from the final draft, most likely because of its superfluous nature. If negotiated contracts are “unconscionable as a matter of law,” they are be subject to legal challenges that may vitiate the entire transactions. It thus behooves legal advocates to avoid the consummation of truly unconscionable accords.

What about seemingly one-sided arrangements that have not been procured through improper means and do not constitute legally unconscionable agreements? Should it be considered unethical or morally reprehensible for attorneys to negotiate such contracts? This concept would place the responsible advocates in a tenuous position. If courts would be unlikely to find the proposed agreements illegal and the opposing parties were perfectly willing to consummate the

³⁵ Lowenthal, *supra* note 12, at 103.

³⁶ See Rubin, *supra* note 2, at 591.

apparently skewed transactions, should the prevailing legal representatives refuse to conclude the deals merely because they believe the transactions may unreasonably disadvantage their opponents? Why should the subjective personal judgments of these lawyers take precedence over the willingness of their opponents and their attorneys to conclude the proposed exchanges? These individuals may not know -- and may never know -- why their opponents considered these deals "fair." Their adversaries may have been aware of factual or legal circumstances that either undermined their own positions or bolstered those of the other side.

Some lawyers might reasonably feel compelled to mention the apparently one-sided aspect of suggested transactions to their own clients. A few might even feel the need to explore this concern at least obliquely with opposing counsel. Would it be appropriate for them to refuse to consummate the agreements even when the other participants still favor their execution? If they continued to sanctimoniously oppose the proposed deals, should they be subject to bar discipline for failing to represent their client with appropriate zeal or to liability for legal malpractice? Attorneys who are positioned to conclude lawful arrangements that would substantially benefit their clients should be hesitant to vitiate the transactions

based solely on their own personal conviction that the proffered terms are “unfair” to their opponents. How many lawyers in these circumstances would inform their clients that they were unwilling to accept offers tendered by opposing parties in response to wholly proper bargaining tactics, merely because they thought the proposed terms were too generous?

Practitioners and law students occasionally ask whether lawyers who represent clients in civil actions arising out of arguably criminal conduct may suggest the possibility of criminal prosecution if the civil suit negotiations are not completed successfully. DR 7-105(A) of the ABA Code of Professional Responsibility, that is still followed by some jurisdictions, states that lawyers shall not "threaten to present criminal charges solely to obtain an advantage in a civil matter."³⁷ This provision might be read to preclude the mention of possible criminal action to advance civil suit discussions. Courts have appropriately acknowledged, however, that neither DR 7-105(A) nor extortion or compounding of felony prohibitions should be interpreted to prevent civil litigants from mentioning the availability of criminal action if related civil claims are not resolved or to preclude clients from agreeing to forego the filing of criminal charges in exchange for money paid to

³⁷ MORGAN & ROTUNDA, *supra* note 9, at 211.

resolve their civil suits.³⁸ Nonetheless, legal representatives must be careful not to use the threat of criminal prosecution to obtain *more* than is owed or have their clients agree not to testify at future criminal trials. "Seeking payment beyond restitution in exchange for foregoing criminal prosecution or seeking any payments in exchange for not testifying at a criminal trial . . . are still clearly prohibited."³⁹

The Model Rules do not contain any provision analogous to DR 7-105(A), and it is clear that the drafters deliberately chose not to prohibit the threat of criminal action to advance civil suit settlement talks pertaining to the same operative circumstances.⁴⁰ As a result, the ABA Standing Committee on Ethics and Professional Responsibility indicated in *Formal Opinion 92-363* (1992), that it is not unethical under the Model Rules for attorneys to mention the possibility of criminal charges during civil suit negotiations, so long as they do "not attempt to exert or suggest improper influence over the criminal process."⁴¹ Nevertheless, legal representatives must still not demand excessive compensation that may

³⁸ See, e.g., *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W.Va. Sup. Ct. 1992).

³⁹ 416 S.E.2d at 727.

⁴⁰ See Joanne Pitulla, *Using the Ultimate Threat Against an Opposing Party*, 78 A.B.A.J. 106 (Oct. 1992).

⁴¹ *Id.*

contravene applicable extortion provisions or promise that their clients will not testify at future criminal trials.

IV. CONCLUDING THOUGHTS

Despite the contrary impression of some members of the general public, I have generally found attorneys to be conscientious and honorable people. I have encountered few instances of questionable behavior. I would thus like to conclude with the admonitions I impart to my Legal Negotiating students as they prepare to enter the legal profession. Lawyers must remember that they have to live with their own consciences, and not those of their clients or their partners. They must employ tactics they are comfortable using, even in those situations in which other people encourage them to employ less reputable behavior. If they adopt techniques they do not consider appropriate, not only will they experience personal discomfort, but they will also fail to achieve their intended objective due to the fact they will not appear credible when using those tactics. Attorneys must also acknowledge that they are members of a special profession and owe certain duties to the public that transcend those that may be owed by people engaged in other

businesses.⁴² Even though ABA Model Rule 1.3 states that “[a] lawyer shall act with reasonable diligence,” Comment 1 expressly recognizes that “a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter shall be pursued.”⁴³

Popular negotiation books occasionally recount the successful use of questionable techniques to obtain short-term benefits. The authors glibly describe the way they have employed highly aggressive, deliberately deceptive, or equally opprobrious bargaining tactics to achieve their objectives. They usually conclude these stories with parenthetical admissions that their bilked adversaries would probably be reluctant to interact with them in the future. When negotiators engage in such questionable behavior that they would find it difficult, if not impossible, to transact future business with their adversaries, they have usually transcended the bounds of propriety. No legal representatives should be willing to jeopardize long-term professional relationships for the narrow interests of particular clients. Zealous representation should never be thought to require the employment of

⁴² See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 77 (1992).

⁴³ MORGAN & ROTUNDA, *supra* note 9, at 12.

personally compromising techniques.

Lawyers must acknowledge that they are not guarantors -- they are only legal advocates. They are not supposed to guarantee client victory no matter how disreputably they must act to do so. They should never countenance witness perjury or the withholding of subpoenaed documents. While they should zealously endeavor to advance client interests, they should recognize their moral obligation to follow the ethical rules applicable to all attorneys.

Untrustworthy advocates encounter substantial difficulty when they negotiate with others. Their oral representations must be verified and reduced to writing, and many opponents distrust their written documents. Negotiations are especially problematic and cumbersome. If nothing else moves practitioners to behave in an ethical and dignified manner, their hope for long and successful legal careers should induce them to avoid conduct that may undermine their future effectiveness.

Attorneys should diligently strive to advance client objectives while simultaneously maintaining their personal integrity. This philosophy will enable them to optimally serve the interests of both their clients and society. Legal practitioners who are asked about their insistence on ethical behavior may take

refuge in an aphorism of Mark Twain: “Always do right. This will gratify some people, and astonish the rest!”